[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 731

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, PETITIONER,

vs.

MARK E. NEBEKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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[fol. 1] [Caption omitted]

[fol. 2] **IN THE SUPREME COURT OF INDIANA**

No. 29004

STATE OF INDIANA,
County of Marion, ss:

INDIANA DEPT. OF STATE REVENUE, GROSS INCOME TAX DIVISION, Appellant,

vs.

MARK E. NEBEKER, Appellee

APPELLANT'S ASSIGNMENT OF ERRORS—Filed January 5, 1953

The Appellant, Indiana Department of State Revenue, Gross Income Tax Division, says and shows to the court that there is manifest error in the decision, judgment and proceedings of the trial court, prejudicial to Appellant in this:

1. The Court erred in overruling the Appellant's Motion for a New trial.

The motion for a new trial, the overruling of which is the error relied upon for reversal in this case specified the following grounds:

1. The decision of the court is not sustained by sufficient evidence.
2. The decision of the court is contrary to law.

Wherefore, the Appellant prays that the decision and judgment rendered herein be reversed, and that the Appellant be granted a new trial and for such other relief to which the Appellant may be entitled.

Respectfully submitted (S.) J. Emmett McMana-[fol. 3] mon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Appellant.

(File endorsement omitted.)

IN THE VERMILLION CIRCUIT COURT, JANUARY TERM, 1951

No. 19115

[fol. 4] MARK E. NEBEKER

vs.

DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION

ENTRY OF FILING OF PETITION FOR TRANSFER—Filed December 8, 1952

Comes now Mark E. Nebeker, petitioner in the above entitled cause and files and presents his verified petition praying that his certain cause of action heretofore pending before the Administrative Adjudication Section of the Indiana Department of State Revenue, Gross Income Tax Division, bearing cause No. 37 of said Agency, be transferred to the Circuit Court of Vermillion County, Indiana, under the terms and provisions of Chapter 305 of the Acts of 1951 of the General Assembly of the State of Indiana.

(File endorsement omitted.)

[fol. 5] IN THE VERMILLION CIRCUIT COURT

RULING OF THE COURT ON PETITION TO TRANSFER

And now the Court being fully advised in the premises orders that said cause of action be transferred to the Vermillion Circuit Court and that a summons issue upon plaintiff's complaint therein to said defendant. Clerk is ordered to issue summons returnable April 30, 1951, directed to the Sheriff of Marion County, Indiana.

[fol. 6] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ENTRY OF FILING OF TRANSCRIPT OF RECORD

Comes now defendant and files transcript for transfer of cause of action, which said transcript is in the following words and figures, to-wit:

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

[fol. 7] DEFENDANT'S COMPLIANCE WITH COURT ORDER FOR TRANSFER OF CAUSE OF ACTION—Filed December 8, 1952

Comes now the defendant and shows to this Honorable Court that the plaintiff heretofore filed in this Court its certain Petition for Transfer of Cause of Action from the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and that the issues and causes heretofore formed, or in process of being formed, be transferred to this Court pursuant to the terms and provisions of Chapter 305 (Senate Bill 201) of the Acts of the General Assembly of Indiana, (87th Session, Effective Date March 7, 1951).

An order having been heretofore made or entered by this court as to the transfer of said cause, the defendant does now tender to the Court for filing in this cause, a transcript of all of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and respectfully requests that the same be ordered filed by the Clerk of this Court and made a part of the record in this cause of action; that said cause is now transferred for such further proceedings as the Court may direct.

Respectfully submitted, J. Emmett McManamon, Attorney General, John J. McShane, Deputy Attorney General, Lloyd C. Hutchinson, Deputy Attorney General, Joseph E. Nowak, Deputy Attorney General.

(File endorsement omitted.)

[fol. 8] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ORDER TO FILE TRANSCRIPT OF THE RECORD, ETC.

The plaintiff in the above entitled cause of action having heretofore filed a certain Petition for Transfer of Cause [fol. 9] of Action from the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and an interlocutory order having been issued upon said petition, and the defendant having heretofore filed Defendant's Compliance with Plaintiff's Petition for Transfer of Cause of Action, which said petition for transfer of Cause of Action and which said Defendant's Compliance are in the words and figures, following, to-wit:

And the Court having examined said plaintiff's Petition for Transfer and Defendant's Compliance with the transcript of the record of the proceedings below having been tendered to the Court, the Court now orders that the transcript of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, the Administrative Adjudication Section, be filed with the Clerk of this Court and the same is now filed with the Clerk of this Court, which said transcript of proceedings is in the following words and figures, to-wit:

[fol. 10] BEFORE THE ADMINISTRATION ADJUDICATION SECTION OF THE INDIANA STATE DEPARTMENT OF REVENUE, GROSS INCOME TAX DIVISION

Cause No. 37

[Title omitted]

Bill of Exceptions

Met pursuant to notice at 10:30 a.m. on the 29th day of March, A.D. 1950, in the offices of the Indiana Department of State Revenue, Administration Adjudication Section, Indianapolis, Indiana.

Before Hearing Judge Rex R. Bridwell, duly appointed under the Administration Adjudication Act, Indiana Department of State Revenue.

BLEED THROUGH POOR COPY

APPEARANCES:

John J. McShane, Deputy Attorney General of the State of Indiana and Fred McClurg, Attorney for Indiana Department of State Revenue, Gross Income Tax Division, Appearing for the Respondent;

Mark E. Nebeker, Appearing for himself as the Protestant.

Reported by: Allan G. Sweeney, 826 Marott Hotel, Talbot—4571, Indianapolis, Indiana.

(File endorsement omitted.)

[fol. 11] PROCEEDINGS

Mr. McShane: Now, for the purpose of the record, in view of what the Court has said, I suggest this stipulation at the outset:

STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties and their respective counsel . . . I take it you are an attorney, too? . . .

Mr. Nebeker: That's right, and practiced for fourteen years; but I don't claim to be one.

Mr. McShane . . . and their respective counsels, prior to the introduction of evidence in this case, that all irrelevant, immaterial and/or duly-repetitious evidence shall be excluded from the evidence by the agent or representative hearing said cause upon motion or objection to be made.

It is further stipulated and agreed between parties hereto that the evidence of any witness shall proceed by way of a direct examination, a cross-examination, a redirect examination, a re-cross examination, and a rebuttal; that the rules of evidence as prescribed by the statute of Indiana and the rules of the Supreme Court of Indiana shall prevail.

It being understood further, in compliance with the Administrative Adjudication Act, that this hearing shall be in an informal manner and without recourse to any of the technical rules of evidence.

It is further stipulated and agreed between the parties [fol. 12] that the petitioner herein made due report and

return of his gross income tax, a liability, to the State of Indiana for the periods from January 1, 1944, to December 31, 1944, and January 1, 1945, to December 31, 1945, and January 1, 1946, to December 31, 1946.

That in the 1944 quarterly return and the annual return for said year the taxpayer indicated, in Schedule 1, certain receipts indicated as "capital gains without deductions or losses (margin account)."

That, in reporting, he, on each return, quarterly and annual in the Year 1945, in Schedule 1, indicated the following: "capital gains without deductions or losses (margin account)," in each of said quarterly returns and the annual return for 1945.

That, in reporting his tax liability for the Year 1946, in his quarterly returns, as well as his annual return, in Schedule 1, he indicated as follows: "Item 4: Capital gains without deductions for losses (margin account)."

That, in the month of October, in 1947, a few days prior to the 28th day of October, 1947, John A. Wolsieffer, a field auditor of the Indiana Gross Income Tax Division, made an audit of the books and records of the petitioner at his residence at No. 1301 South Main Street, in the City of Clinton, Vermillion County, Indiana, for the periods mentioned in this stipulation, to wit: January 1, 1944, to and including December 31, 1946.

That as a result and consequence of said audit and [fol. 13] examination an inspection of the books and records so made by said field auditor disclosed a denial of certain claims for refund made by the taxpayer in the total sum of $311.51.

That a copy of said report of said field auditor dated October 28, 1947, was duly mailed to him at his address at 1301 South Main Street, Clinton, Vermillion County, Indiana, by the Indiana Gross Income Tax Division, and said report, designated as "preliminary statement," is now marked for purpose of identification as "Respondent's Exhibit No. 1," and is now offered, introduced and read into the evidence of this cause.

That said audit was made by said field auditor pursuant to directions of the Indiana Gross Income Tax Division because of the fact that the petitioner herein duly paid

the taxes for which a claim for refund was filed for the Year 1944 in the sum of $88.29; for the Year 1945 in the total sum of $146.49, and in 1946 in the sum of $76.63, which said claim for refund was disallowed by the Indiana Gross Income Tax Division on or about December 15, 1947.

That the Indiana Gross Income Tax Division caused a letter to be written to the petitioner herein on or about December 15, 1947, advising said petitioner of this dis-[fol. 14] allowance of said claim for refund.

That thereafter the petitioner petitioned the Indiana Gross Income Tax Division for an informal hearing upon his said claim for refund, under and pursuant to the provisions of Section 14 of the Indiana Gross Income Tax Act of 1933 as amended, and said petition for hearing was filed prior to the adoption of the Administrative Adjudication Act.

That after said hearing by the Indiana Gross Income Tax Division the same was denied.

That the claim for refund by the petitioner on or about October 2, 1947, is now marked "Respondent's Exhibit 2" for purposes of identification, and is now offered, introduced and read into the evidence in this cause, and is in the words and figures following, to-wit:

(The above-mentioned document—marked "Respondent's Exhibit 2"—admitted into evidence at this time reads as follows:

EXHIBIT No. 2 TO STIPULATION

Respondent's Exhibit 2. A.G.S.
Received Oct. 2, 1947, Gross Income Tax Div.
File 83-579.
Received Oct. 2, 1947, Gross Income Tax Div. (Audit Section).
Do not Write in This Space.
Gross Income Tax Division,
Department of Treasury,
141 South Meridian Street,
Indianapolis, Indiana.

A claim for refund is hereby made in the total amount of $311.51 on account of Gross Income Tax returns filed and tax paid in the name of:

[fol. 15] Name of Taxpayer—Mark E. Nebeker.

Address—1301 S Main St., Clinton, Vermillion, Indiana covering the following periods:

Year	Claim for Refund	Amount Claimed As Refund
1944	Filed ——	$ 88.39
1945	Approved ——	$146.49
1946	Disallowed Dec. 1, 1947	$ 76.63
	Warrant No. ——	
	Date ——	

The reasons why Claim for Refund should be allowed, are as follows (explain fully):

Establishment of the non-taxability of sales of securities executed outside of the state of Indiana by decision of the United States Supreme Court in the case of Freeman Trustee vs. Hewit.

The above amounts were reported and paid on sales of securities without the state of Indiana.

(Signature) Mark E. Nebeker.

STATE OF INDIANA,
County of Vigo, ss:

Sworn to and subscribed before me this 30th day of September, 1947.

Luana Yeager, Notary Public.

My Commission expires Oct. 5, 1950.

Fiduciaries must furnish a certified copy of their appointment.

If claim or any part of claim is allowed, taxpayer will be supplied with proper state voucher for signature and notarization, which must be properly executed before actual refund is made.

[fol. 16] Mail to 141 S. Meridian, Indianapolis, Indiana.
Gilbert K. Hewit, Director Gross Income Tax Division, Department of Treasury.

POOR COPY
BLEED THROUGH

No Objections by Taxpayer.

It is further stipulated and agreed between the parties that the petitioner, Mark E. Nebeker, did on or about the 22nd day of December, 1947, file with the Indiana Gross Income Tax Division his protest protesting the order of denial of his claim, and thereafter and on the 29th day of March, 1948, the Indiana Gross Income Tax Division did acknowledge receipt of said protest made on or about December 22, 1947, and set the matter of the protest down for a hearing before the agent or representative of the Gross Income Tax Division, and, on June 2, 1948, the Gross Income Tax Division duly notified the petitioner that a hearing upon his protest would be held on June 22, 1948, in the office of the Division.

It is further stipulated and agreed that the petitioner, Mark E. Nebeker, is and for more than ten years past has been a resident of Vermillion County, Indiana.

That during the taxable Year 1944 petitioner consummated certain transactions in the purchase and sale of corporation capital stock through stock brokerage firms of [fol. 17] Thomson & McKinnon and/or James E. Bennett & Company, as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 21	Texas & Pacific R.R.	100	$79 76
Feb. 10	Texas & Pacific R.R.	100	104 57
Feb. 11	United Fruit Company	200	52 66
Mar. 10	Johns Manville	100	620 56
Apr. 11	J. C. Penney Company	100	219 80
Apr. 27	Texas Corp.	100	33 18
May 12	Commercial Credit Corp.	100	13 16
June 6	General Foods	100	39 28
June 13	Commercial Solvents	100	121 55
July 7	International Harvester	100	402 53
July 7	Sears-Roebuck	100	19 80
July 21	Eaton Manufacturing	100	397 53
Aug. 4	International Harvester	100	126 46
Sep. 8	Sears-Roebuck	100	69 80
Sep. 15	United Fruit Company	200	393 26
Nov. 8	Sears-Roebuck	100	207 30
Nov. 10	Pullman Corp.	100	203 99
Nov. 21	Eaton Manufacturing	100	21 20
Nov. 22	Johns Manville	100	7 30
Mar. 11	Caterpiller Tractor	100	40 15
Apr. 11	Southern Pacific	100	175 37
Apr. 11	Atchison, Topeka & Santa Fe	100	1,685 48
Apr. 21	Southern Pacific	100	301 56
Apr. 27	General Foods	100	18 60
Sep. 7	Cornell Doubelier	100	61 15

[fol. 18]

Date	Corporation	No. Shares	Gain
Sep. 7	Charles Pfizer	100	1,010.73
Sep. 13	United Aircraft	100	31.07
Sep. 14	General American Transport	100	672.79
Oct. 5	Commercial Solvents	100	108.90
Nov. 29	Atchison, Topeka & Santa Fe	100	1,220.58
Nov. 30	Sun Oil Company	10	70.34
Dec. 1	Allis Chalmers	100	309.33
	Total		$8,839.74

That as a result of such transactions the complainant accomplished a capital gain of $8,839.74 during the said Year of 1944.

That he reported said income as heretofore pointed out and reported other income in excess of his $1,000 exemption and paid on said reported gain at the rate of 1 per cent a gross income tax of $88.39.

That during the Year 1945 petitioner consummated transactions of purchase and sale of corporation stock through the brokerage firm of Thomson & McKinnon and/or James E. Bennett & Company as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 17	Clark Equipment	100	$239.38
Feb. 20	Union Carbide & Carbon	100	423.58
Mar. 9	Youngstown Sheet & Tube	100	568.34
Mar. 15	Skelley Oil	100	131.46
Mar. 23	Eaton Mfg. Company	100	306.23
[fol. 19]			
Apr. 2	Union Carbide & Carbon	100	198.52
Apr. 5	Johns-Manville	100	569.78
May 1	United Fruit Company	100	1,421.17
May 2	United Fruit Company	100	919.92
May 24	Eaton Mfg. Company	100	392.76
July 30	Radio Corp. of America	100	10.84
Aug. 1	Sylvania Electric Products	100	111.71
Aug. 13	Johns-Manville	100	319.75
Aug. 21	United Fruit Company	200	439.58
Sep. 15	Eaton Mfg. Co.	100	140.63
Sep. 17	Johns-Manville	100	219.73
Nov. 19	Atchison, Topeka & Santa Fe	100	1,069.79
Nov. 27	General Foods	100	189.01
Dec. 10	U. S. Industrial Chemical	100	476.04
Dec. 12	Commercial Solvents	100	416.79
Dec. 12	Minneapolis Honeywell	100	144.71
Dec. 13	Bucyrus Erie	100	24.74
Dec. 14	Commercial Credit Corp.	100	159.00
Dec. 21	Eaton Mfg. Company	100	338.87
Feb. 16	Mathison Alkali Company	100	214.47
Mar. 6	Phillips Petroleum	100	739.39
Mar. 9	Phillips Petroleum	100	653.11
Mar. 9	Gulf Oil Corp.	100	643.96
Mar. 9	Freeport Texas Sulphur	100	641.04
July 30	Radio Corp. of America	100	86.03
Dec. 19	Celanese Corp.	100	2,489.49
	Total		$14,609.82

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[fol. 20] That as a result of said transactions claimant accomplished a capital gain of $14,692 during the said Year of 1945; that he made due return to the Gross Income Tax Division, as hereinbefore stated; that in said year petitioner reported other income in excess of his $1,000 exemption, and that he paid on said reported gain at the rate of 1 per cent a gross income tax of $146.99.

That during the Year 1946 petitioner consummated transactions of purchase and sale of corporation capital stock through the stock brokerage firms of Thomson & McKinnon and/or James E. Bennett & Company, as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 11	Eaton Manufacturing	100	$387.49
Jan. 28	Socony	100	50.43
Feb. 13	Link Belt	100	583.73
Apr. 25	Eaton Manufacturing	100	543.13
Apr. 29	Continental Can	100	647.45
May 8	Continental Can	100	21.26
May 22	U. S. Industrial Chemical	100	1,076.12
June 13	Continental Can	100	544.81
July 17	American Can	50	161.54
Jan. 15	Phillips Petroleum	100	837.63
Jan. 22	Gulf Oil	100	865.56
May 24	United Aircraft	100	80.95
June 28	United Aircraft	100	1,623.34
	Total		$7,425.44

[fol. 21] That as a result of said transactions claimant accomplished a capital gain of $7,423.44 during the said Year of 1946; that he made due return of said gross income to Indiana Gross Income Tax Division, as hereinbefore stated.

That in said year claimant reported other income in excess of his $1,000 exemption, and that he paid on said reported gain at the rate of 1 per cent a gross income tax of $74.23.

It is further agreed and stipulated that in each and every instance of purchase and sale of corporation stock as stated purchase was made by the broker and the stock credited to the account of the claimant on the books of the broker and the cost thereof was debited to the account of the claimant on the books of the broker kept in the State of Indiana. The stock certificates were never ordered out or transferred to the claim of the claimant. Neither were they ever delivered to the claimant in a street name. But

the property interest in the stock was maintained in what is commonly called a margin account.

The petitioner herein had the right to receive dividends, the dividends paid on the stock, the right to vote or direct the vote of the stock in a corporation stock-holders' meeting, the right to sell the stock and receive the proceeds. The rights of ownership, if any, are subject only to the terms of a pledge to the broker for the payment of any indebtedness that might be owing by the claimant to the broker.

It is further stipulated and agreed that as sales were [fol. 22] made by the broker upon the orders of the petitioner, the sold shares of stock were debited to the account of the petitioner and the proceeds were credited to the account of the petitioner on the books of the broker kept in the State of Indiana.

IN THE VERMILLION CIRCUIT COURT

CAUSE TRANSFERRED BY ORDER OF COURT

And this cause of action is now transferred to this Court for such further proceedings as the Court may direct.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ENDORSEMENT OF ORDER OF COMPLIANCE—Filed June 4, 1951

[File endorsement omitted.]

[fol. 23] [File endorsement omitted]

IN THE VERMILLION CIRCUIT COURT

PLAINTIFF'S REQUEST TO CHANGE TITLE AND GRANTING THEREOF—filed June 12, 1951

Comes now the plaintiff in the above entitled cause and shows to the court that in the title of this cause the name of the defendant herein was inadvertently stated as Indiana Department of State Finance, Gross Income Tax Division. Whereas the true and correct name of said defendant is Indiana Department of State Revenue. Wherefore plaintiff asks leave to correct the title of this cause to show the true name of the defendant.

And now the Court being fully advised in the premises grants plaintiff's said request and orders that the title of this cause be changed to state the name of the defendant as [fols. 24-25] Indiana Department of State Revenue, Gross Income Tax Division.

Comes now the defendant herein and tenders to the Court for filing in this cause, a transcript of all of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section and requests that same be ordered filed by the Clerk of this Court and made a part of the record in this cause of action and that said cause of action is now transferred for such further action as the Court may direct.

And now the Court being fully advised in the premises orders that said transcript be filed by the Clerk of this Court and made a part of the record of this cause of action and the Court further orders that this cause of action is now transferred for such further action as the Court may direct.

[fol. 26] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

SECOND AMENDED COMPLAINT—Filed October 1, 1951

Comes now the plaintiff and complains of the defendant, and for cause of action says:

1

That plaintiff is, and for more than ten years last past, has been a continuous resident of, and has been domiciled in, Vermillion County, State of Indiana.

2

That ever since the enactment of the Indiana Gross Income Tax Law, being Chapter 50 of the Acts of the General Assembly of The State of Indiana, he has reported quarterly and annually to the defendant his gross income, and has paid tax thereon as provided by said act. That among the items of gross income so reported, and so paid, was income derived from the sale of intangible personal property to various vendees who were located outside the State of Indiana, and who were residents of states other than the State of Indiana.

[fol. 27]

3

That on or about the 2nd day of October, 1947, he filed with the defendant his claim for refund of gross income tax theretofore illegally assessed by defendant on said sales of intangible personal property, and paid by plaintiff, as follows:

For the year 1944	$ 88.39
For the year 1945	146.49
For the year 1946	76.63
Total	$311.51

4

That thereafter, on the 15th day of December, 1947, defendant denied plaintiff's request for refund for the years 1944, 1945 and 1946 in the total amount of $311.51.

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5

That thereafter, on or about December 22, 1947, plaintiff filed his formal protest against said order denying his claim for refund.

6

That on January 1, 1948, plaintiff's claim for refund became governed by the Administrative Adjudication Act, being Chapter 365 of the Acts of the General Assembly of the State of Indiana for the year 1947. That before a complete determination of plaintiff's claim for refund could be had under said act, the same was amended by Chapter 305, Acts of the General Assembly of the State of Indiana for the year 1951, which act provided that any pending claims for refund could, upon petition filed before [fol. 28] May 1, 1951, be transferred to the county of taxpayer's residence for final adjudication and determination.

7

That pursuant to plaintiff's petition filed prior to May 1, 1951, his claim for refund was transferred to the Vermillion Circuit Court.

8

That during the year 1944 he consum-ated transactions of purchase and sale of certain divisional interests in various corporations, commonly called corporation corporate stock, through the brokerage firms of Thomson & McKinnon and/or James E. Bennett and Company, as follows:

Date	Corporation	No. Shares	Gain
Jan. 21	Texas & Pacific R. R.	100	79.76
Feb. 10	Texas & Pacific R. R.	100	104.57
Feb. 11	United Fruit Co.	200	52.56
Mar. 10	Johns-Manville	100	620.56
Apr. 14	J. C. Penney Co.	100	219.80
Apr. 27	Texas Company	100	33.18
May 12	Commercial Credit Corp.	100	13.16
June 6	General Foods	100	29.28
June 13	Commercial Solvents	100	121.55
July 7	International Harvester	100	402.53
July 7	Sears Roebuck	100	19.80
July 21	Eaton Manufacturing	100	397.53
Aug. 4	International Harvester	100	126.46

[fol. 29]

Date	Corporation	No. Shares	Gain
Sept. 8	Sears Roebuck	100	69.80
Sept. 15	United Fruit Co.	200	393.26
Nov. 8	Sears Roebuck	100	207.30
Nov. 10	Pullman Corp.	100	203.99
Nov. 21	Eaton Manufacturing	100	21.20
Nov. 22	Johns-Manville	100	7.30
Mar. 11	Caterpillar Tractor	100	40.15
Apr. 11	Southern Pacific	100	175.37
Apr. 11	Atchison, Topeka & Santa Fe	100	1,685.48
Apr. 21	Southern Pacific	100	301.56
Apr. 27	General Foods	100	18.60
Sept. 7	Cornell Doubelier	100	61.15
Sept. 7	Charles Pfizer	100	1,010.73
Sept. 13	United Aircraft	100	31.07
Sept. 14	General American Transport	100	672.79
Oct. 5	Commercial Solvents	100	108.90
Nov. 29	Atchison, Topeka & Santa Fe	100	1,220.58
Nov. 30	Sun Oil Co.	10	70.34
Dec. 1	Allis Chalmers	100	309.33
	Total		$8,839.74

9

That during the year 1945 he consum-ated similar transactions of purchase and sale as follows:

Date	Corporation	No. Shares	Gain
Jan. 17	Clark Equipment	100	239.38
Feb. 20	Union Carbide & Carbon	100	423.58
Mar. 9	Youngstown Sheet & Tube	100	568.34
[fol. 30]			
Mar. 15	Skelly Oil	100	131.46
Apr. 2	Union Carbide & Carbon	100	198.52
Apr. 5	Johns Manville	100	569.78
May 1	United Fruit Co.	100	1,421.17
May 2	United Fruit Co.	100	919.92
May 24	Eaton Manufacturing Co.	100	392.76
July 30	Radio Corporation	100	10.84
Aug. 1	Sylvania Electric	100	111.71
Aug. 13	Johns Manville	100	319.75
Aug. 21	United Fruit Co.	200	439.58
Sept. 15	Eaton Manufacturing Co.	100	140.63
Sept. 17	Johns-Manville	100	219.73
Nov. 19	Atchison, Topeka & Santa Fe	100	1,069.79
Nov. 27	General Foods	100	189.01
Dec. 10	U. S. Industrial Chemical	100	476.04
Dec. 12	Commercial Solvents	100	416.79
Dec. 12	Minneapolis Honeywell	100	144.71
Dec. 13	Bucyrus Erie	100	24.74
Dec. 14	Commercial Credit Co.	100	159.00
Dec. 21	Eaton Manufacturing Co.	100	338.87
Feb. 16	Matteson Alkali	100	214.47
Mar. 6	Phillips Petroleum	100	739.39
Mar. 9	Phillips Petroleum	100	653.11
Mar. 9	Gulf Oil Co.	100	643.96

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Date	Corporation	No. Sahres	Gain
Mar. 9	Freeport Texas Sulphur	100	641.04
Mar. 23	Eaton Manufacturing Co.	100	306.23
July 30 [fol. 31]	Radio Corporation	100	86.03
Dec. 19	Celanese Corp.	100	2,489.49
	Total		$14,699.82

10

That during the year 1946 he consum-ated similar transactions of purchase and sale as follows:

Date	Corporation	No. Shares	Gain
Jan. 11	Eaton Manufacturing Co.	100	387.49
Jan. 28	Socony	100	50.43
Feb. 13	Link Belt	100	583.73
Apr. 25	Eaton Manufacturing Co.	100	543.13
Apr. 29	Continental Can	100	647.45
May 8	Continental Can	100	21.26
May 23	U. S. Industrial Chemical	100	1,076.12
June 13	Continental Can	100	544.81
July 17	American Can	50	161.54
Jan. 15	Phillips Petroleum	100	837.63
Jan. 22	Gulf Oil Co.	100	865.56
May 24	United Aircraft	100	80.95
June 28	United Fruit	100	1,623.34
	Total		$7,425.44

11

That in each and every instance of the purchase of corporate stock herein alleged the purchase was made by plaintiff's broker, and the stock credited to plaintiff's account on the books of the broker, and the cost was debited to plaintiff's account on the broker's book, which books were kept by the broker in the State of Indiana. Plaintiff's [fol. 32] ownership of said corporate stock was never transferred to plaintiff's name on the stock registers of the various corporations, nor were the certificates representing and evidencing said corporate stock, bearing assignments in blank, in so-called "street names", delivered to plaintiff, but were at all times kept and possessed by plaintiff's brokers in the State of New York.

12

That at all times mentioned herein the plaintiff had the right, by virtue of the contracts between him and his

brokers, to obtain the delivery and transfer of said corporate stocks to himself, the right to obtain the transfer of his ownership on the transfer books and stock registers of the various issuing corporations, the right to receive the dividends paid on said stock, the right to direct his brokers how to vote said stock at stock-holders meetings, and the right to sell said stock, and to receive the proceeds therefrom. That the certificates of stock were held by plaintiff's brokers in the State of New York as agent for plaintiff, and as pledges to said brokers as security for indebtedness that might be owing by plaintiff to his brokers.

13

That as sales of said stock were made by plaintiff said shares of stock so sold were debited to plaintiff's account by the broker, and the proceeds of sale were credited to plaintiff's account by his broker, on the broker's books, which were kept in the State of Indiana.

14

[fol. 33] That during the years 1944, 1945, and 1946, while plaintiff owned said shares of stock, as aforesaid, the State of Indiana assessed said property under the Intangibles Tax Law of the State of Indiana, and compelled plaintiff to pay the tax so assessed on said corporate stocks.

15

That each and all of said purchases and sales, as aforesaid, were made by the plaintiff through the New York Stock Exchange, acting through his brokers, as aforesaid.

16

That each and all of said purchases and sales of said property were transactions in interstate commerce and were and are exempt from the payment of Gross Income Tax to the State of Indiana; that no gross income tax was or is due or payable to the State of Indiana on account of the same by reason of the fact that all of said transactions constituted, and were, interstate commerce, and the gross receipts of plaintiff were receipts from business conducted

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in commerce between the State of Indiana, the State of New York, or other states of the United States. That the gross income tax collected thereon constituted an unlawful regulation of, and an illegal burden upon commerce between the State of Indiana and the other states of the United States in conflict with Article I, Section 8 of the Constitution of the United States, and that the State of Indiana, and the defendant herein, were and are prohibited from taxing such gross income or receipts under the Gross Income Tax Law of 1933, and laws amendatory thereof and supplemental thereto.

[fol. 34] 17

Wherefore, plaintiff prays and demands judgment against the defendant for the sum of $311.51, together with interest thereon from the date of payment of said tax, for the costs of this action, and for all proper relief in the premises.

Raymond O. Evans, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 35] In the Vermillion Circuit Court

[Title omitted]

Peremptory Rule to Answer—October 23, 1951

Defendant ruled to answer plaintiff's second amended complaint on or before November 1, 1951.

Record read and signed in open Court this 23rd day of October, 1951.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

[fol. 36] ANSWER TO SECOND AMENDED COMPLAINT—November 1, 1951

Comes now the defendant in the foregoing cause of action and for answer to plaintiff's second amended complaint, alleges and says:

1. Defendant admits the material allegations contained in numerical paragraphs four (4), five (5), six (6) and seven (7) of plaintiff's second amended complaint herein.

2. Defendant, with respect to numberical paragraph three (3) of plaintiff's second amended complaint, admits that the plaintiff did on or about the 2nd day of October, 1947, file a Claim for Refund of Gross Income Tax for the years and amounts specified in said paragraph, but defendant denies that the taxes sought to be refunded were illegally assessed by defendant on said sales of intangible personal property.

3. Defendant is without information and/or *or* knowledge concerning the allegations contained in numerical paragraphs one (1), two (2), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15) of plaintiff's second amended complaint.

4. Defendant denies the material allegations contained in numerical paragraph sixteen (16) of Plaintiff's second amended complaint.

5. With respect to any paragraph, sentence or phrase not heretofore admitted or denied, defendant now [fols. 37-38] specifically denies each such paragraph, sentence or phrase.

Wherefore, defendant prays judgment for its costs and for all other necessary and proper relief in the premises.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

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[fol. 39] ARGUMENT AND SUBMISSION—April 7, 1952

(omitted in printing)

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

STIPULATION—Filed April 7, 1952

It is agreed and stipulated by and between the parties that the evidence in this cause, heretofore given at the trial had before the Administrative Adjudication Section of the Indiana Department of State Revenue, shall be considered as evidence in the said cause. That in addition thereto it is stipulated that the Department of State, Revenue, Intangible Tax Division, assessed intangible tax against the plaintiff herein covering the securities listed in rhetorical paragraphs 8, 9 and 10 of the Second Amended Complaint for the years 1944, 1945 and 1946, and that the plaintiff paid the taxes thereon. That said evidence before the Administrative Adjudication Section of the Indiana Department of State Revenue and the additional evidence herein before stipulated shall be all the evidence in said cause, and that such evidence, after its introduction, [fol. 40] reading and admission into the evidence by the Court, shall be all of the evidence forming and constituting the Bill of Exceptions in this cause.

It is further agreed and stipulated that upon the acceptance and admission by the Court of such evidence forming the Bill of Exceptions, that the plaintiff and the defendant rest.

It is further agreed and stipulated by and between the parties that in the event that an appeal is taken by either party in this cause of action to a court of appellate jurisdiction, it will be unnecessary for the clerk in preparing the record, to incorporate into the same the Transcript of the proceedings before Administrative Adjudication which were filed with the Clerk of the Court to comply with the petition for transfer from the Administrative Adjudication Section of the Indiana Department of State Revenue,

and which appears among the papers in the record of the Clerk of the Court.

Further that the praecipe for the Record may direct that a Bill of Exceptions shall be included in the Transcript for appeal and the original may be utilized, without copying.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant; Raymond O. Evans, [fol. 41] Crawfordsville, Indiana, Attorney for Plaintiff.

(File endorsement omitted.)

IN THE VERMILLION CIRCUIT COURT, JANUARY TERM, 1952

[Title omitted]

BILL OF EXCEPTIONS—Filed April 7, 1952

Be it remembered that on the 7th day of April, 1952, it being the 73rd day of the January Term, 1952, of the Vermillion Circuit Court, Honorable Frank Fisher, Judge, presiding, the following proceedings were had in this Cause.

The Cause being at issue and being submitted to the Court for trial, the Parties to maintain the issues on their behalf, introduced the following evidence.

[fol. 42] [File endorsement omitted]

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

STIPULATION

It is agreed and stipulated by and between the parties that the evidence in this cause, heretofore given at the trial had before the Administrative Adjudication Section

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of the Indiana Department of State Revenue, shall be considered as evidence in the said cause. That in addition thereto it is stipulated that the Department of State Revenue, Intangible Tax Division, assessed intangible tax against the plaintiff herein covering the securities listed in rhetorical paragraphs 8, 9 and 10 of the Second Amended Complaint for the years 1944, 1945 and 1946, and [fol. 43] that the plaintiff paid the taxes thereon. That said evidence before the Administrative Adjudication Section of the Indiana Department of State Revenue and the additional evidence herein before stipulated shall be all the evidence in said cause, and that such evidence after its introduction, reading and admission into the evidence by the Court, shall be all of the evidence forming and constituting the Bill of Exceptions in this cause.

It is further agreed and stipulated that upon the acceptance and admission by the Court of such evidence forming the Bill of Exceptions, that the plaintiff and the defendant rest.

It is further agreed and stipulated by and between the parties that in the event that an appeal is taken by either party in this cause of action to a court of appellate jurisdiction, it will be unnecessary for the clerk in preparing the record, to incorporate into the same the Transcript of the proceedings before Administrative Adjudication which were filed with the Clerk of the Court to comply with the petition for transfer from the Administrative Adjudication Section of the Indiana Department of State Revenue, and which appears among the papers in the record of the Clerk of the Court.

Further that the praecipe for the Record may direct that a Bill of Exceptions shall be included in the Transcript for appeal and the original may be utilized, without copying.

J. Emmett McManamon, Attorney General, John [fol. 44] J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant; Raymond O. Evans, Crawfordsville, Indiana, Attorney for Plaintiff.

[fol. 45] IN THE VERMILLION CIRCUIT COURT

The Cause having been submitted to the Court without the intervention of a Jury, the parties hereto stipulated entire evidence in this Cause. Whereupon the plaintiff rested. Defendant reste[illegible] And this was all the evidence given in the trial of said Cause.

ORDER ALLOWING BILL OF EXCEPTIONS—December 8, 1952

Be it further remembered, that afterwards on the 8th day of December, 1952, the defendant presented and tendered to the said Frank Fisher, Judge of Said Court, this, its Bill of Exceptions, for his signature and prayed the same might be signed, sealed and made a part of the record of said cause, and which said Bill of Exceptions is now here on this 8th day of December, 1952, allowed and signed and filed by the said Frank Fisher, as such Judge, to be and constitute a part of the record and proceedings of said Cause.

And I now certify that the above Bill of Exceptions is full, true and correct, and contains all of the evidence offered and given, together with all objections, motions, and rulings made in connection therewith, in the trial of this action.

(Signed) Frank Fisher, Judge, Vermillion Circuit Court.

(File endorsement omitted.)

[fol. 46] IN THE VERMILLION CIRCUIT COURT

CAUSE TAKEN UNDER ADVISEMENT BY COURT

And the Court having heard the argument of counsel now takes the matter under advisement and continues the same for ruling.

Record read and signed in open Court this 7th day of April, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

Cause 19115

MARK E. NEBEKER

vs.

INDIANA DEPARTMENT OF REVENUE, GROSS INCOME TAX DIVISION

JUDGMENT—May 29, 1952

The Court having heretofore heard the evidence herein and heard argument of counsel and examining briefs and being duly advised now finds for the plaintiff that the allegations of plaintiff's complaint are true and that Department of State Revenue, State of Indiana, Gross Income Tax Division, is indebted to plaintiff herein in the sum of $311.51, being the amount of tax paid by plaintiff under protest, plus interest in the amount of $69.81 thereon.

It is therefore, ordered, adjudged and decreed that plaintiff have and recover of the defendant herein judgment in the sum of $311.51 principal and $69.81 interest together with costs laid out and expended herein.

[fol. 47] Record read and signed in open Court this 29th day of May, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

DEFENDANT'S MOTION FOR NEW TRIAL—June 27, 1952

Comes now the defendant, Indiana Department of State Revenue, Gross Income Tax Division, in the foregoing cause of action and respectfully moves the Court for a new [fol. 48] trial, and for grounds therefor states:

1. The decision of the Court is not sustained by sufficient evidence;
2. The decision of the Court is contrary to law.

Wherefore, the aforesaid said defendant respectfully moves the Court for a new trial in said cause and for all other necessary and proper relief in the premises. Defendant respectfully requests oral argument on motion.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

[fol. 49] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—October 7, 1952

The Court being duly advised now overrules defendant's motion for New Trial.

Record read and signed in open Court this 7th day of October, 1952.

[fol. 50] Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

DEFENDANT'S EXCEPTION TO RULING OF THE COURT, PRAYER FOR APPEAL AND GRANTING THEREOF

Comes now defendant by counsel and excepts to the ruling of the court heretofore entered in this cause on the 7th day of October, 1952, Exception granted.

Defendant now prays appeal to the Indiana Supreme Court. Appeal granted, Defendant is given ninety days in which to file any and all bills of exceptions herein.

Record read and signed in open Court this 10th day of October, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

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[fol. 51] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

PRAECIPE—October 17, 1952

To the Clerk of the Vermillion Circuit Court of Vermillion County, Indiana:

You are hereby respectfully requested to prepare and certify a full, true and complete Transcript of the Entire and All of the Record in the above entitled cause to be used upon and for an appeal to the Indiana Supreme Court of the State of Indiana, except that you will include therein the [fol. 52] original Bill of Exceptions containing the evidence instead of a copy thereof, in which final judgment was rendered on the 7th day of October, 1952, and to include the following: A full, true and complete Transcript of the entire and all of the record and the original Bill of Exceptions, and all papers filed and on file in said cause.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] IN THE SUPREME COURT OF INDIANA

Comes now the parties by counsel and the court being advised in the premises, affirms the judgment of the court below in the following opinion pronounced by Flanagan, J.

OPINION—December 15, 1953

In the case of *Freeman* v. *Hewit* (1947), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, the Supreme Court of the United States decided that an Indiana citizen who bought stock on the New York Stock Exchange was engaged in interstate commerce, and therefore was not subject to tax

on those transactions under the Gross Income Tax Law of the State of Indiana. In that case the Indiana citizen actually bought and paid for the stock.

The question here presented is whether that decision governs buying on margin.

The factual difference, as we understand it, is that when stock is bought on margin the broker advances a percentage of the purchase price, holds a lien on the stock for his advancement, and does not permit the stock certificate to be put in the name of the customer unless the customer pays in full, which rarely happens.

[fol. 55] This factual difference merely relates to the method of financing.

However, the State of Indiana contends that transactions of this kind are only matters of bookkeeping; that, since the stock certificates themselves do not cross state lines, no question of interstate commerce is involved.

We cannot agree. Importance cannot attach to whether a piece of paper goes over state boundaries. Importance must attach to whether the *transaction itself* was a part of interstate commerce.

As the Supreme Court of the United States pointed out in the case of *Freeman* v. *Hewit*, *supra*, the vital question in each case is whether the *sale itself* was in the field of interstate commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference.

The trial court held that the facts in this case bring it within the rule laid down in the *Freeman Case*. We think the trial court was correct.

Judgment affirmed.

Dissenting Opinion

Come now Emmert, J., and dissents with an opinion in [fol. 56] the above entitled appeal, Draper, C. J., concurs in same, which opinion is in the words and figures following, to-wit:

The net effect of the majority opinion is a decision that a net income tax assessed against a resident of Indiana upon his capital gains realized from sales of common stock on

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the New York Stock Exchange, when the certificates remained in New York, violates the Commerce Clause of the Federal Constitution. This contravenes the ruling precedents of the Supreme Court of the United States, which are binding on this court, on the right of the states to impose taxes which are not in violation of the Commerce Clause.

The appellee, hereafter referred to as the taxpayer, was a resident of and domiciled in Indiana and in the years 1944, 1945 and 1946, through two brokerage firms who had branch offices in Indiana, bought and sold corporate stocks on the New York Stock Exchange. The stocks here involved were bought and sold on a margin account, the certificates being taken in a street name, and held by the brokers in New York as agents for the plaintiff. The certificates were pledged to the brokers as security for any indebtedness that might be owing from the taxpayer to his brokers. Under the stipulation made in the trial court by the appellant, hereinafter referred to as Indiana, and the taxpayer, the difference between the sale price, and the purchase price paid by the taxpayer at the time of acquisi-[fol. 57] tion, resulted in a gain in each transaction in the total sums as follows:

Years	*Number of Sales*	*Shares Sold*	*Gains*
1944	32	3,310	$ 8,839.74
1945	31	3,200	14,699.82
1946	13	1,250	7,425.44

No losses sustained by the taxpayer from the sale of any corporate stock were deducted from these gains. The taxpayer allocated his $1,000 deduction under $64-2605(b), Burns' 1951 Replacement, to other transactions, and asserted in the trial court he was entitled to a refund for taxes paid as follows:

1944 claimed refund	$ 88.39
1945 claimed refund	$146.99
1946 claimed refund	$ 76.63
Total claimed refund	$311.51

We are not concerned in this appeal with the validity of Regulation 1005 since the taxpayer paid the taxes in dispute

under the assumption that it applied to him, and Indiana asserts that this regulation furnishes the basis for computing the taxes owed for the respective years.

We should not let the decision in this case be influenced by the name given the Act by the General Assembly.[1]

"In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, [fol. 58] 177; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435." *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U. S. 359, 363, 61 S. Ct. 586, 85 L. Ed. 888, 132 A.L.R. 475.[2]

In considering the validity of the various provisions of the Indiana Act, the Supreme Court of the United States has held that the provisions then before it substantially imposed a tax on gross receipts, and was therefore analogous to a sales tax. *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 311, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429; *Harvester Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313; *Freeman* v. *Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

However, under the law and the facts in this appeal the tax asserted by Indiana is not a gross receipts tax under any possible definition of the term. It is a tax upon the capital gain in each transaction, with no deduction permitted for transactions in which the taxpayer may have sustained a capital loss by sale of corporate stock at less

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[1] "This act may be cited as the Gross Income Tax Act of 1933." Section 64-2601, Burns' 1951 Replacement.

[2] "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon gross receipts from an interstate sale.' Lockhard, Gross Receipts Taxes on Interstate Transportation and Communications, 57 Harv. L. Rev. 40, 87." *Harvester Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 346, 64 S. Ct. 1019, 88 L. Ed. 1313.

than the purchase price. Therefore the decisions in *Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 311, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429, *supra* and *Freeman* v. *Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, *supra*, establish no basis for holding the taxpayer immune from the Indiana tax on his capital gains.

In substance, Indiana has sought to impose a net income tax on the capital gains transactions realized on a margin stock account, by an Indiana resident domiciled in this [fol. 59] state. The fact that from an accounting standpoint the taxpayer had other costs in the transactions which he may not deduct for the purpose of computing the tax, does not make the tax any the less a net income tax. It could hardly be contended that §23(h) of Ch. 1 of the U. S. Internal Revenue Code, 26 U.S.C.A. §23(h), which provides that, "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions," makes the Act a tax on gross receipts. See also §117(d) of Ch. 1 of the U. S. Internal Revenue Code, 26 U.S.C.A. §117(d).[3]

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax

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[3] (1) "In the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges.

(2) "In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, 'net income' as used in this paragraph shall be read as 'adjusted gross income'. Section 117(d), Ch. 1, U. S. Internal Revenue Code, 26 U.S.C.A. §117(d)."

upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises, [fol. 60] treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." *U. S. Glue Co.* v. *Oak Creek* (1918), 247 U. S. 321, 328, 329, 38 S. Ct. 499, 62 L. Ed. 1135. The Indiana tax in controversy here violates neither the Commerce Clause nor the Fourteenth Amendment of the Federal Constitution.

The judgment of the trial court should be reversed.

Draper, C. J., concurs in this opinion.

[fol. 61] [File endorsement omitted]

[fol. 62] [File endorsement omitted]

IN THE SUPREME COURT OF INDIANA

PETITION FOR REHEARING—Filed January 4, 1954

Comes now the appellant in the foregoing captioned appeal and, pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana, respectfully petitions this Court

for a rehearing upon its opinion, decision and judgment entered December 15, 1953, for the following reasons:

1. The Court, in its majority opinion, erred in having considered the receipts herein taxed as gross receipts from interstate sales, whereas said receipts admittedly consisted of "capital gains" from investments made by appellee, a resident and domiciliary of Indiana.

2. The Court, in its majority opinion, erred in having considered the case of *Freeman* v. *Hewit*, 1946, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265 as controlling,—said authority being applicable to a gross receipts tax imposed upon gross receipts from interstate sales, whereas the instant case concerns a gross earnings tax imposed upon [fol. 63] capital gains from investments made by appellee, a resident and domiciliary of Indiana.

3. The Court, in its majority opinion, erred in holding that the income tax herein assessed against appellee, a resident and domiciliary of Indiana, upon his capital gains violates the Commerce Clause of the Federal Constitution.

4. The Court, in its majority opinion, erred in holding in effect that a tax on capital gains or gross earnings, remaining after the deduction of costs of acquisition, is subject to the same objections, under the Commerce Clause, as a tax imposed upon gross receipts without any deductions whatsoever.

5. The Court erred in holding that the transactions resulting in the capital gains herein taxed were in interstate commerce, whereas the appellee, an Indiana resident, was not required to perform any act in interstate commerce.

Wherefore, appellant respectfully prays that this, its petition for rehearing, be granted; that the Court adopt the dissenting opinion entered December 15, 1953 as its opinion; that the decision, judgment and decree of the trial court be reversed in all things and for all other necessary and proper relief in the premises.

Respectfully submitted, (S.) Edwin K. Steers, Attorney General, Lloyd C. Hutchinson, Deputy Attorney General.

[fol. 64] IN THE SUPREME COURT OF INDIANA

ORDER DENYING PETITION FOR REHEARING—January 27, 1954

Come now the parties by counsel and the court, being advised in the premises, denies the appellant's petition for rehearing heretofore filed herein. Draper, C. J., Emmert, J., and Draper, C. J. dissent.

[fol. 65] IN THE SUPREME COURT OF INDIANA

[Title omitted]

STIPULATION CONCERNING PARTS OF RECORD TO BE OMITTED FROM RECORD AS CERTIFIED TO CLERK OF THE UNITED STATES SUPREME COURT—Filed March 16, 1954

The parties to the above captioned cause, by counsel, stipulate that the Clerk of the Indiana Supreme Court shall [fol. 66] *omit* from the record therein, as certified to the Clerk of the United States Supreme Court, the following:

1. Pages I to VIII inclusive. (Index to Record on file with the Clerk of Indiana Supreme Court.)
2. Page 3, l. 2 to page 5, l. 15, inclusive. (Petition for Transfer to the Vermillion Circuit Court from the Administrative Adjudication Section of the Indiana Department of State Revenue, Gross Income Tax Division).
3. Page 5, l. 18 to page 15, l. 11, inclusive. (Original Complaint, Endorsement on Complaint, Praecipe for Summons.)
4. Page 15, l. 18 to page 18, l. 27, inclusive. (Issuance of Summons, Summons, Endorsement and Return on Summons, Filing of Appearance, Appearance, Endorsement on Appearance.)
5. All of pages 23 and 24. (Minute and Order Book Entries of Administrative Proceedings before Indiana Department of State Revenue.)
6. Page 28, l. 14 to page 31, l. 27, inclusive. (Exhibit 1 to Stipulation, which is the Preliminary Statement

of John A. Wolsieffer, Field Auditor for Gross Income Tax Division, dated October 28, 1947.)

7. Page 42, l. 8 to page 60, l. 27, inclusive. (Testimony of Mr. Wolsieffer, Gross Income Tax Division Auditor, Recommended Special Findings of Fact and Conclusions of Law of Administrative Hearing Agent, [fol. 67] Protestant's Objections to such Recommended Findings, Order of Revenue Board ordering hearing on Protestant's Objections, Certificates of Administrative Adjudication Section Reporter and Hearing Agent.)

8. Page 61, l. 16 to page 63, l. 17, inclusive. (Entry of Filing of Defendant's Motion to Require Plaintiff to Separate and Number Paragraphs of Complaint, that motion and endorsement thereon.)

9. Page 65, l. 2 to page 80, l. 20, inclusive. (Court orders filing of Amended Complaint, Amended Complaint (First), Endorsement on Amended Complaint, Peremptory Rule to Answer, Entry of Filing of Defendant's Motion to Strike, Motion to Strike, Endorsement on Motion to Strike, Argument thereon, Ruling of Court on Motion to Strike.)

10. Page 92, l. 6 to page 93, l. 27, inclusive. (Certificate of Mailing of Defendant's Answer, Endorsement on Answer, Entry of Assignment of Cause for Trial, Plaintiff's Request and Granting of Request to Remove Record.)

11. Page 100, l. 17 to 27, inclusive. (Consists of Marginal Note by Appellant, which extends into the body of page 100.)

12. Page 104, l. 23 to page 106, l. 21, inclusive. (Endorsement on Defendant's Motion for New Trial, Certificate of Mailing of Defendant's Motion for New Trial, Assignment for Hearing of Defendant's Motion [fol. 68] for New Trial, Entry of Oral Argument on Motion for New Trial, Ruling thereon taken under advisement.)

13. Page 108, l. 8 to page 111, l. 9, inclusive. (Notice of Appeal to Plaintiff, Acknowledgment of Service thereof and Endorsement thereon, Notice of Appeal to Clerk and Endorsement thereon.)

14. Page 112, 11. 11-27, inclusive. (Endorsement on Praecipe filed with Clerk of Vermillion Circuit Court.)

15. Page 113, 1. 6 to page 114, 1. 27, inclusive. (Entry of tender of Bill of Exceptions with Lower Court, Approval thereof by Lower Court.)

16. Also *omit* all entries and proceedings in the Indiana Supreme Court, *except the following:*

(a) Entry of submission of Record and Assignment of Errors, dated January 5, 1953.

(b) Entry of decision and opinions of Indiana Supreme Court, dated December 15, 1953.

(c) Majority and Dissenting Opinions, dated December 15, 1953.

(d) Entry of filing of Appellant's Petition for Rehearing on January 4, 1954.

(e) Appellant's Petition for Rehearing as filed on January 4, 1954.

(f) Entry of Denial of Appellant's Petition for Rehearing on January 27, 1954.

(g) Entry of filing of this Stipulation.

(h) This Stipulation.

[fol. 69] (i) Entry of filing of Praecipe with Clerk of Indiana Supreme Court.

(j) Praecipe as filed with Clerk of Indiana Supreme Court.

Dated this 16th day of March, 1954.

(S.) Raymond O. Evans, Attorney at Law, Attorney for Respondent, Ben Hur Building, Crawfordsville, Indiana; Edwin K. Steers, Attorney General of Indiana, Carl M. Franceschini, Cornelius G. Jamison, Lloyd C. Hutchinson, Deputies Attorney General of Indiana, Attorneys for Petitioner, 219 State House, Indianapolis, Indiana.

(File endorsement omitted.)

[fols. 70-71] PRAECIPE FOR TRANSCRIPT OF RECORD

(Omitted in printing)

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, Petitioner,

vs.

MARK E. NEBEKER

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.